

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	)	
	)	
Valérie DE LA POTERIE	)	Group Art Unit: 1615
	)	
Application No. 10/821,919	)	Examiner: Venkat, Jyothsna A.
	)	
Filed: April 12, 2004	)	
	)	
For: COSMETIC COMPOSITION	)	Confirmation No. 2430
HAVING A CERTAIN THERMAL	)	
PROFILE	)	

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

VIA EFS WEB

Sir:

**DECLARATION UNDER 37 C.F.R. § 1.132**

I, Florence LAHOUSSE, do hereby make the following declaration:

1. I am a French citizen residing at 50 rue Victor Basch 94320 Thiais
2. I earned a degree in cosmetology from University of Nantes in 1996 and a master degree of biochemistry from CNAM of Paris in 2007.
3. I have been employed by L'Oreal since 1997 and currently hold the position of chemist technician.
4. At least by virtue of my education and experience, I am qualified to make the following statements.
5. I understand the rejections set forth in the non-final Office Action mailed June 18, 2009 in the above-referenced Application No. 10/821,919.

6. In the Office Action, independent claim 1 is rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 3,911,105 to Popantoniou et al. ("the '105 patent"). Office Action at 3. Claim 1 is also rejected under 35 U.S.C. § 103(a) as being unpatentable over the '105 patent. Id. at 6.

7. As evidence that the present invention is not anticipated, disclosed, or suggested by the '105 patent, Example 29 of the '105 patent was prepared for comparative testing. Example 29 is believed to be the closest prior art example in the '105 patent because it is a mascara composition and Applicants' claimed invention according to claim 1 is a mascara. '105 patent, col. 14, lines 20-22.

8. For the comparative testing, Fatty Composition P of Example 29 was prepared, using polystearyl acrylate as the homopolymer, instead of the homopolymer of Example 1 of the '105 patent, which is polyvinyl stearate. Id., col. 6, line 10, and col. 14, lines 28-35. This substitution was made because polystearyl acrylate is Applicants' elected species of "at least one compound," as recited in claim 1.<sup>1</sup>

9. Table 1 itemizes the components in this composition (all amounts are in grams). The amounts are the same as those used in Example 29 of the '105 patent.

**TABLE 1**

Beeswax	24.4
lanolin alcohol	4.9
acetylated lanolin	3.9
POLYSTEARYL ACRYLATE	5.8
Isoparaffin	56.8
Black iron oxide	4
Methyl parahydroxy benzoate	0.2
<b>Total</b>	<b>100</b>

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<sup>1</sup> During an interview with the Examiner on November 9, 2009, the Examiner indicated to Applicants' representatives that polystearyl acrylate should be used as the polymer in testing that is based on Example 29 of the '105 patent.

10. The amounts of beeswax, lanolin alcohol, acetylated lanolin, and polystearyl acrylate, which together comprise the "fatty composition" in Example 29, sum to 39 grams, which is the mass of Fatty Composition P used in Example. Id., col. 14, lines 24-27. Also, the proportion of each of beeswax, lanolin alcohol, acetylated lanolin, and polystearyl acrylate to the total mass of the fatty composition (39g) is the same as in Example 29. See id., lines 32-25. The amounts of each component of the fatty composition are calculated below for reference:

Example 29

beeswax  $(39\text{g} \times 62.5\text{g}) / 100 = 24.4\text{g}$

lanolin alcohol  $(39\text{g} \times 12.5\text{g}) / 100 = 4.9\text{g}$

acetylated lanolin  $(39\text{g} \times 10\text{g}) / 100 = 3.9\text{g}$

polystearyl acrylate  $(39\text{g} \times 15\text{g}) / 100 = 5.8\text{g}$

11. The composition was evaluated with regards to being "heat-stable" as recited in claim 1. The procedure for evaluating heat-stability is set forth in Applicants' specification at paragraph [0156] on page 38. The procedure is described below.

12. The viscosity of the composition at an initial time, T<sub>0</sub>, is measured. Then, the composition is placed in an oven at 80°C for 2 hours and then removed from the oven and allowed to return to room temperature. This corresponds to one heat cycle. The viscosity is again measured.


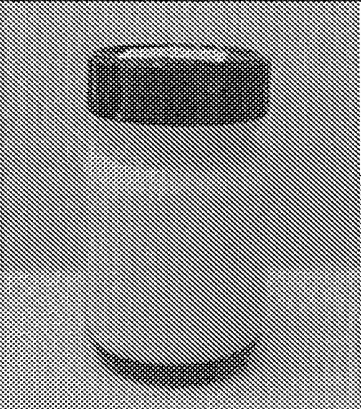
13. A composition is considered to be heat-stable if it regains its initial viscosity  $\pm 15\%$  after several cycles of heating the composition above its melting point.

14. As shown in Table 2 below, the composition of Example 29 dephased during the first heat cycle. Therefore, the composition of Example 29 is not heat-stable.

Further, as shown in the photographs below, the composition on the left photograph is an inventive composition, while the composition on the right is that of Example 29, after it has dephased.

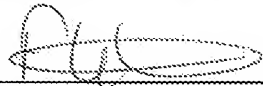
**TABLE 2**

Viscosity measured after 10 min	Number of fusion cycles (1 cycle = 2h at 80°C and then placed at room temperature)			
viscosity (Pa.s)	T0	1	2	3
variation of the viscosity from initial value %	20.9	Dephasing (non heat stable composition)		

	
A composition that is heat-stable, as determined with the above protocol.	A composition that dephased after being placed for 2 hours in an 80°C oven, and is therefore not heat-stable.

15. At least in view of this evidence, the compositions of the '105 patent, even if modified to include polystearyl acrylate, do not possess the heat-stability of claim 1.

16. I further declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true, and further, that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the application or any patent issuing thereon.

Dated: December 16th 2009 By:   
Florence LAHOUSSE